IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

No. 10- COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING.

[Chapter VIII, Rule 32(2) (b)]

Criminal Jail Appeal No. 246/2001
(Old No. 1706/1985)

Ajai Chanana … Appellant.

Vs.

State .. Respondent.

Decided on 29-7-2005

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

(Irshad Hussain, J.)

(B.S. Verma, J.)

Dated: 29-7-2005.

In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 246/2001
(Old No. 1706/1985)

Ajai Chanana S/o Bhagwan Dass Chanana,
R/o 186, Awas Vikas Colony, P.S. Kashipur,
District Nainital (now District U.S. Nagar) … Appellant.

Vs.

State .. Respondent.

Sri Rajendra Kotiyal, Advocate, learned Amicus Curiae for the appellant.
Sri Amit Bhatt, learned A.G.A. for the State.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma, J.

Dated: 29-07-2005

(Per : Hon'ble Irshad Hussain, J.)

Accused Ajai Chanana preferred appeal from his conviction and sentence to imprisonment for life under Section 302/34 I.P.C. per judgment dated 27-6-1985, passed by the then II Additional Sessions Judge, Nainital (co-accused Munna also convicted and sentenced had died and criminal appeal No. 247/2001 preferred by him stand abated and was dismissed as such on 6-5-2004).

2- Brief facts of the case were as under:-

Informant, Rakesh Kumar Mehrotra (P.W.1) and his friend Manjit Singh were resident of Mohalla Lohariyan of the town of Kashipur. On 7.1.1982 at about 7.30 P.M. they left their residential locality to go to the town market. They prosecuted Gita Bhawan lane and took a turn to reach in front of the house of one Pradeep Sharma. At that place they saw Vijay Gangwar, Munna Photographer, Ajai Chanana and one of their companion coming towards them. These four made the informant and Manjit Singh to halt there. Out of those four all except the unknown person took out knives and started attacking the informant and Manjit Singh. The informant at once got alert and climbed over the stairs of the house of Pradeep Sharma but Manjit Singh was given knife blows by these three knife wielding assailants. On alarm being raised by the informant Manjit Singh,

Pradeep Sharma came out of his house besides other namely Beni Madho Singh and Vijaypal Singh, the brother of Manjit Singh who were also attracted at that place. They challenged the assailants were upon all the three knife wielding assailants and their fourth companion fled away towards vegetable market. While escaping from the scene of the incident the fourth companion of the assailants, who was standing near the motorcycle, fired a shot in the air by way of giving threat to deter the informant and others from chasing the assailants. These four then escaped from the scene of the occurrence on a motorcycle. Injured Manjit Singh was taken to the hospital by his brother Vijaypal Singh.

3- Informant Rakesh Kumar Mehrotra thereafter prepared written report, Ext. Ka.1 and lodged it at the P.S. Kashipur, the same day, at 8.10 P.M. and F.I.R., Ext. Ka.4 was drawn and case under Section 307 I.P.C was registered against the three named assailants and one of their unknown companion, who were seen in the electric light at the scene of the incident. According to the prosecution case in the month of April 1981 accused Munna and Ajai Chanana and two of their companions made an assault on Kamal Kishore, a friend of the informant. The matter was reported to the police and the informant and Manjit Singh were cited as the witness of that incident. Since then these accused started entertaining enmity against the informant and Manjit Singh.

4- The investigation of the case was entrusted to S.I. Tejbir Singh (P.W.7). He recorded the statements of the witnesses and attached bloodstained clothes of Manjit Singh vide memo, Ext. Ka.6. Injured Manjit Singh died in the hospital on 8.1.1982 and the case was then converted to one under Section 302 I.P.C. vide G.D. report, Ext. Ka.11. The Investigating Officer held inquest on the dead body and prepared inquest report, Ext. Ka. 7 and relevant documents. The post mortem on the dead body was conducted by Dr. R.P. Rastogi (P.W.4) at 1.25 P.M. on 8.1.1982. on 9.1.1982 the investigation was taken up by S.H.O. Devendra Kumar Thaplial, who arrested the accused Chandra Prakash on 16.1.1982 and was kept ‘Baparda’. His test identification parade was held. On completion of the investigation charge sheets were submitted against the four accused viz. Vijay

Gangwar (who died during the trial). Chandra Prakash (who was acquitted by the Sessions Judge), Munna (who died during the pendency of his appeal) and present accused-appellant Ajai Chanana.

5- The accused pleaded not guilty and claimed his trial.

6- During the trial, prosecution examined eleven witnesses to prove the charge levelled against the accused. Out of these, P.W.1, informant Rakesh Kumar; P.W.2, Pradeep Kumar Sharma and P.W.5, Beni Madho Singh are the eye witnesses of the occurrence and they gave evidence to support the prosecution case. P.W.3, Dr. S.P. Gupta examined the victim Manjit Singh at 8.05 P.M. on 1.7.1982 at L.D. Bhatt Civil Hospital, Kashipur. Following injuries were detected on the person of the injured:-

1- Incised wound 1.8 cm x 1cm x muscle deep on left side of neck vertical in direction tailing downward lower end is 2cm above the medial end of left clavicle and bleeding present.

2- Incised wound on left side at base of neck 2.5cm x 1cm x muscle deep. Tailing downward. Wound was transverse outer end is 11 cm medial to lateral end of left clavicle. Bleeding present.

3- Incised wound 1.5 cm x 1cm x muscle deep left side of scapular region vertical. The upper end is 6cm below the injury No.2. bleeding present.

4- Incised wound 1cm x .6cm on back muscle deep vertical over thoracic first vertebral spine. Bleeding present.

5- Incised wound 2.5cm x 08cm x depth not probed on left side of chest back lower part oblique tailing down upper end is 6cm above end outward to left renal angle. Bleeding present.

6- Incised wound 2cm x 08cm x muscle deep on back mid line. Tailing downward, oblique lower end is 18cm above and towards medially in mid line the injury No.5. Bleeding present.

7- Incised wound 2.5cm x 1cm x depth not probed on right side of chest back in right inter scapular region. Tailing downward, 6 cm above and medial to lower end of right scapula. Bleeding present.

8- Incised wound 1.5cm x 1cm x muscle deep on right glutial region 5.5 cm below and lateral to right interior superior iliac spine. Tailing posteriorly. Bleeding present.

9- Incised wound 2cm x 1cm x muscle deep on right glutial region 5.5 cm above and lateral to right superior iliac spine. Tailing posteriorely. Bleeding present.

7- In the opinion of the Medical Officer these injuries were caused by sharp edged weapon such as knife and were fresh. He also proved the injury report, Ext. Ka.2. He also gave out that at the beginning of the medical examination injured told him that he was assaulted by Munna and Chanana. Injured also spoke of some other things which were not understandable.

8- According to him some time between 8.05 to 3.30 P.M. S.I. Tejbir Singh came to mini operation theatre and made queries about the injured and also went near the bed where this injured was then lying in the operation theatre. Endorsement to this effect was made on the bed head ticket, Ext. Ka.1.

9- P.W.4, Dr. R.P. Rastogi held autopsy on the dead body of Manjit Singh who died in the hospital at 1.25 A.M. on 8.1.1982. Autopsy was held the same day at 10 A.M. and post mortem report, Ex. Ka.3 was then prepared. The ante-mortem injuries detected were the same as mentioned in reference to the evidence of P.W.3.

On internal examination pleura on the upper part found cut, brain was congested, right lung was cut and congested and there was about four ounce semi-digested food in the stomach. The death was caused due to shock and haemorrhage resulting from the ante-mortem injuries.

10- P.W.6, Head Constable Rameshwar Chandra Tyagi gave formal evidence about the preparation of the check F.I.R. and G.D. report about the registration of the case. He denied to the suggestion that F.I.R. was ante-timed and it was not lodged at 8.10 P.M. on 7.1.1982.

11- P.W.7, S.I. Tejbir Singh initially started investigation of the case on 7.1.1982 and recorded the statement of informant, injured Manjit Singh (deceased), witness Vijay Pal Singh and attached blood-stained clothes of the victim vide memo, Ext. Ka.6. on 8.1.1982 he

held inquest on the dead body and dispatched the dead body for post mortem. He proved the relevant papers pertaining to inquest. He also prepared site plan, Ext. Ka.12 and seized sample of the blood-stained and plain earth from the place of the occurrence vide memo, Ext. Ka.13. On 9-1-1982 investigation was taken from him by S.H.O. Devendra Kumar Thapliyal, who on completion of the investigation submitted charge sheet, Ext. Ka.14 agaisnt the accused on 19-1-1982. In cross-examination he denied to suggestion that when he reached at the place of the occurrence at about 12.30 – 1.00 A.M. in the night between 7/8-1-1982 there was no light on the street. He admitted that while recording the statement of injured Manjit Singh compliance of Regulation-115 of the Police Regulations was not made by him in the sense that two independent witnesses were not taken at that time. He filed copy of the statement of injured Manjit Singh, Ext. Ka.15 on record.

12. P.W.8, Prayag Dutt; P.W. No.9 Constable Karambir Singh; P.W.10 Sri H.C. Karnatak, Deputy Collector and P.W.11, Head Constable Heera Ballabh gave evidence in regard to Chandra Prakash who also faced trial and was acquitted by the learned Sessions Judge.

13. In defence on witness Ramesh Chandra Gupta (D.W.1) was examined. He was posted as Senior Supervisor of Hydel Sub Station, Kashipur and he was summoned with the register maintained at the Sub Station in regard to the time of availability of the street light in Mohalla Lohariyan. He gave out that as per the entry in the register the street light of Mohalla Lahoriyan where Gita Bhawan was situate went off at 18.30 hours on 7.1.1982 due to some technical fault and the electric supply was not restored throughout the night. Ext. Kha.2 was the extract of the entry of the register placed on record. He also gave out in the cross examination that the domestic lights of said locality remained in order on 7.1.1982. he could not show as to when the street lights were put in order. He admitted that there were instructions that street lights have to be restored at once if any fault occurs in the electric line. He denied to suggestion that the entries in the registered was falsely made to help the cause of the accused.

14- Learned Sessions Judge made elaborate discussion of the evidence of the prosecution referring particularly to the evidence of

the three eye witnesses and on appraisal of the same came to the conclusion that the evidence being credible and reliable proved the prosecution case against the accused beyond doubt. Learned Sessions Judge also opined that the statement of the deceased recorded by the Medical Officer was admissible in evidence as oral dying declaration and it was also very strong corroborative evidence against the accused. The learned Sessions Judge, has, however rejected the so called dying declaration, Ext. Ka.15 recorded by the Investigating Officer by way of the statement under Section 161 of the Code of Criminal Procedure.

15- Learned counsel appearing on behalf of the accused persuasively argued that the evidence of the three eye witnesses examined in the case was highly shaky and discrepant as material contradictions and omission have crept in their evidence indicating that they have had no occasion to be there at the scene of the incident and that due to darkness they could not have identified the assailants of Manjit Singh deceased. Learned counsel also submitted that there was conflict in the ocular and the medical evidence in the sense that despite claim by the witnesses that the assailants gave knives blow in piercing or stabbing manner no punctured wound was detected on the person of the deceased and all the incised wounds found could have been caused if the knives were to be used in a cutting manner. The admissibility of the alleged oral dying declaration, recorded by the medical officer, in evidence was adversely commented upon as was also the case in regard to the F.I.R. of the case. learned counsel lastly submitted that the accused could not have been convicted merely on the basis of suspicion about his involvement in the commission of the crime.

16- As against this, the learned A.G.A. supported the inferences drawn by the learned Sessions Judge and persuasively argued that the case being based upon the direct evidence of the three witnesses the role assigned to the accused was fully established as one of the assailant of the victim Manjit Singh and was thus rightly convicted and sentenced for committing the murder of the said victim.

17- The case, as pointed out above, rests mainly on the ocular evidence of P.W.1, P.W.2 and P.W.5. P.W.1 , informant Rakesh

Kumar Mehrotra was accompanying Manjit Singh deceased from their Mohalla Lahoriyan on way to the market at the time of the occurrence. He supported the prosecution case that the occurrence took place in front of the house of Pradeep Sharma which is situate near the turn of Gita Bhawan lane which was prosecuted by the witness and the deceased to reach that place in order to visit the town market. P.W.2, Pradeep Kumar Sharma and P.W.5 Beni Madho Singh also gave the evidence that occurrence took place in front of the house of P.W.2. All these three witnesses were not cross-examined to suggest that the occurrence took place at some other place. Ext. Ka.12, site plan was prepared by the Investigating Officer P.W.7, S.I. Tejbir Singh, who also affirmed that sample of the bloodstained and plain earth was seized from point 'A' situate in front of the house of witness Pradeep Kumar Sharma. Although there is no report of the Serologist but considering the un-assailed evidence of the three eye witnesses coupled with the finding of the blood at that spot there remain no reason to entertain even the least doubt in the claim of the prosecution that occurrence took place there in front of the house of witness Pradeep Kumar. Learned Sessions Judge also rightly held so one appreciation of the evidence in the case.

18- In regard to the time of the occurrence also the evidence of these three eye witnesses is cogent and definite and which also stand corroborated by the medical evidence of Dr. S.P. Gupta who medically examined Manjit Singh deceased at 8.05 P.M. the same day and found the injuries fresh. There not being much distance from the place of the occurrence to the hospital it was thus highly probable that the injured Manjit Singh was shifted to the hospital within half an hour and the ocular evidence and medical evidence on record thus fully established that the occurrence took place at about 7.30 P.M. as alleged by the prosecution. On account of the injuries sustained by Manjit Singh at that time, his death was caused in the night at about 1.20 A.M. on 8-1-1982 and there was also no doubt that the death of Manjit Singh was homicidal. Even the defence has not raised serious dispute about the place, time of the occurrence and that the death of Manjit Singh was homicidal and whosoever caused him ante-mortem sharp edged weapon injuries intended to commit his murder.

19- In regard to the author of the injuries of the said deceased, we have the evidence of above three eye witnesses who have been throughout very consistent that the deceased was assaulted with knives wielded by present accused Ajai Chanana and his two companions Vijay and Munna. Learned counsel for the accused argued that although the informant Rakesh Kumar Mehrotra (P.W.1) was accompanying Manjit Singh at the time of the occurrence, and according to the prosecution and the evidence of the witness also accused were inimical towards both of them, but dispute this the witness was not made to face the brunt of the attack by knives made by the accused and his companions and this make it obvious that the witness was not accompanying his friend Manjit Singh at that time. We see no merit in this argument because the witness gave out that as soon as accused moved forward with knives to attack he at once climbed on the stairs of the house of Pradeep Sharma and the accused could round up only his companion Manjit Singh deceased who was then given knives below wielded by all the three assailants including the present accused. There was nothing unusual in the witness taking such a wise step to save himself and in a situation like this the assailants would have thought it fit to waylaid only Manjit Singh deceased so that one of the two, at least, could be successfully eliminated as a result of assaults by them. Therefore, if in a situation like this informant Rakesh Kumar Malhotra remained unscathed there was nothing unusual in it and on account of this his evidence was not required to be rejected.

20- The incident took place in front of the house of Pradeep Kumar Sharma (P.W.2) and therefore it was natural for him to come out of the house on hearing the shouts or alarm raised by the informant and the victim. His cross-examination was not directed to suggest that at the time of the arrest he was not in his house and was else-where in connection with his vocation or other activity. In other words his presence at the scene of the occurrence could not be assailed by his cross-examination and therefore, he was also the most natural and probable witness of the occurrence. He claimed to have seen the present accused and his companions giving knives blow to Manjit Singh deceased where-after the assailants fled away on motorcycle

with another companion after a shot from pistol was fired to keep away the witnesses from chasing them.

21- The third eye witness Beni Madho Singh (P.W.5) claimed that at the time of the occurrence he was coming from Mohalla Quila along with Vijay Pal the brother of Manjit Singh while returning from the house of his friend Asha Chaubey whose house was situate on the passage leading to his own Mohalla Quila and on which passage also Gita Bhawan was situate. He was confronted with his statement under Section 161 of the Code of Criminal Procedure to bring on record a contradiction that he then claimed that he was going with Vijay Pal to market from in front of the Gita Bhawan lane. Referring to this contradiction it was argued that he was a chance witness and he was not expected to be there at the place of the incident. We see no merit in the argument because the claim of the witness has been consistent that he went via Gita Bhawan lane even though he was going to market with Vijay Pal instead of going to his house in Mohalla Quila which in any case was connected with the Gita Bhawan lane. We are convinced that this witness was also natural witness of the occurrence and his evidence could not have been rejected merely on account of this minor infirmity. This witness was also natural and has not made exaggeration to claim that he reached the scene of the incident at the start of the assault made by the accused on the victim. He gave out that when he reached near the spot he saw that the victim Manjit Singh was lying on the ground and all the three assailants were giving the victim knife blows. Similar statement was given by P.W.2, Pradeep Kumar Sharma, who came out of the house on alarm and by that time victim Manjit Singh was waylaid and was being given knife blows by the three assailants including accused before us. At any rate both these witnesses have also witnessed the accused giving knife blows to Manjit Singh and their evidence fully corroborated the testimony of informant Rakesh Kumar Mehrotra referred above and there being no embellishment in their evidence the same in our view was rightly held to be credible and reliable by the learned Sessions Judge.

22- To discredit the evidence of these eye witnesses the learned counsel for the accused drew attention to the fact that these witnesses

gave out that the assailants were giving knife blows to Manjit Singh in piercing manner and the knives were not drawn across the seat of the injuries given to the victim and despite such claim all the nine incised wounds sustained by the victim were incised in nature indicating that these witnesses have not seen as to how and in what manner the knives were wielded by the assailants in the incident. Learned counsel claimed that there being inconsistency between the ocular and the medical evidence of the case a grave doubt and suspicion was created in the credibility of the evidence and in the face of this peculiar aspect of the matter the evidence of the witnesses need to be rejected so as to give benefit of doubt to the accused. We wee no merit in this argument also because there was no conflict in the ocular and medical evidence because there was definite medical evidence of Dr. R.P. Rastogi (P.W.4) the Autopsy Surgeon which affirmed that the incised wounds on the person of the victim were sustained by stabbing of knife because even if the knife blow is given in a piercing or stabbing manner even then incised wound would be caused to the victim. He also gave out that if a knife blow is given in piercing manner the would sustained would still be called as incised wound which do not differ physical character with the incised would which is also caused by sharp edged weapon such as knife. At any rate it is well settled that when ocular evidence is cogent and credible, medical evidence to the contrary can not corrode the evidentiary value of the former and this principle apply squarely to the reliable and cogent evidence of the three eye witnesses referred above. There can be no gain saying that the argument of the learned counsel being out of tune and against the ocular as well as medical evidence could not be legally sustained.

23- It was then argued that the occurrence took place in the dark hours of the night and there being no street light at the time of the occurrence these three witnesses of the fact could not have fixed the identity of the assailants and that this important aspect of the matter was not considered in proper perspective by the learned Sessions Judge. We fail to subscribe to the view of the learned counsel. The reason being that all the three witnesses have been very consistent in saying that they witnessed the incident in the street light as well as in the electric light in front of the ‘Chabutra’ of the house of witness

Pradeep Kumar. The incident took place in front of that house and in the site plan, Ext. Ka.12 also the street light points and the electricity point of the 'Chabutara' of the house of Pradeep Kumar have been shown and there being light at the time of the occurrence these witnesses have had full opportunity to identify the assailants including the one before us. The evidence of the defence witness referred to above failed to made any dent in the prosecution story in that regard because he could not tell as to whether the electricity which went off at 6.30 P.M. on 7.1.1982 due to technical fault in Mohalla Lahoriyan was restored thereafter or not dispite the instructions that the faults were to be removed at once by the electricity department. Therefore it was not proved that there was no street light at 7.30 P.M. on that day. Moreover he said nothing about the domestic light which in this case was there on the 'Chabutara' of the house of Pradeep Kumar which too provided a sources of light, at the time of the occurrence, to facilitate the witnesses to see the occurrence and to identify the assailants of the victim Manjit Singh. Considering the evidence on record we come to the conclusion that the learned Sessions Judge also rightly held that there was electric light in the vicinity of the place of the occurrence at the time when the incident took place and then rightly accepted the prosecution evidence that the witnesses have fixed the identity of the assailants of the victim.

24- All the three witnesses were cross examined at length but nothing of vital importance as may assail their credibility could be brought on record. The mere fact that they together used to visit a local Zymkhana and were well known to each other would not deter us from placing reliance on their otherwise trustworthy evidence and for this reason also the learned Sessions Judge was justified in rejecting the similar plea raised before him. In our view also the evidence of these three witnesses was credible and reliable to prove that the three assailants including the one before us namely accused Ajai Chanana was the author of the fatal knife injuries sustained by Manjit Singh deceased at the time and place as claimed by the prosecution.

25- Learned Sessions Judge also place reliance on the oral dying declaration of the victim as given to Medical Officer Dr. S.P. Gupta

(P.W.) who endorsed in the injury report, Ext.Ka.2 that the injured alleges to have been stabbed by Munna and Chanana etc. There was no occasion for the injured to have given such a statement to the medical officer and further there was also no requirement for the medical officer to ask at that time from the injured as to who were the assailants. Moreover mentioning the two names of the assailants and then endorsing etcetera against the two names raised a suspicion as to why the injured failed to give the names of all the assailants if he was in fact making such a statement before the medical officer. In the bed head ticket, Ext. Kha.1 the general condition of the injured was then also mentioned to be poor and he was not supposed to be in such a fit state of mind and health to have told the medical officer the names of his assailants, therefore we find force in the argument of the learned counsel for the accused that this piece of evidence was not worth reckoning in support of the prosecution version. At any rate this aspect of the matter would not make any difference as the evidence of the three eye witnesses being credible was sufficient to prove the charge against the accused beyond doubt.

26- The F.I.R. of the case was lodged with promptness which no doubt also corroborate the evidence of the eye witnesses and so was the case with regard to the medical evidence already referred above with reference to the argument advanced by the learned counsel for the accused. Motive aspect was also considered by the learned Sessions Judge and we subscribe to the view that the accused was entertaining enmity on account of the incident which occurred about nine months before the instant incident in the month of April 1981 and reference of which was also made in the F.I.R., Ext. K1. In that earlier incident Manjit Singh deceased was a witness against the accused persons and there can be no doubt that for that reason the accused were entertaining enmity and grudge against Manjit Singh deceased and they gave vent to their feelings when they had the occasion on the day of the occurrence of the case and fatally assaulted their opponent Manjit Singh.

27- Upon consideration of the evidence on record, we find ourselves in full agreement with the conclusion of the learned Sessions Judge that the prosecution evidence has been able to

established that the three assailants including the accused before us fatally assaulted Manjit Singh and charge against them under Section 302/34 I.P.C. has been proved beyond all reasonable doubt.

28- In the result the appeal fails and is to be dismissed. The appeal is hereby dismissed. The judgment dated 27-6-1985 convicting and sentencing the accused Ajai Chanana to imprisonment for life under Section 302/34 I.P.C. is hereby affirmed. The accused shall suffer the sentence awarded against him. He is on bail. He shall he taken in to custody and sent to jail to serve out the sentence.

29- Let the record be sent back to the court concerned for compliance, to be reported to the court in two months.

(B.S. Verma,J.) **(Irshad Hussain, J.)**

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